Supreme Court, U.S.
FILED

93-1116 JUL 6 1993

OFFICE OF THE CLERK

No. _____

Supreme Court of the United States
October 1993 Term

Willie J. Brown

Petitioner,

vs.

Penn Central Transportation Co. Director,
OWCP U.S. Dept of Labor
U.S. Court of Appeals for the Third Circuit
Case No. 87-BLA 1264 OWCP No. 260-01-1809
BRB No. 89-1662-BLA Case No. 92-3011

Respondents

Petition of Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit
State of Pennsylvania

Petiion for Writ of Certiorari

Belinda S. Morton
Counsel of Record for Petitioner.

Pro se Willie J Brown

Willie J. Brown
312 Harper Heights Road
Beckley, WV 25801
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SEP 07 1993

54 pp

Question Presented

Administrative Law Judge Ben L. O'Brien of the United States, at the hearing granted claimant thirty (30) days leave to submit rebuttal testimony as to Dr. Zaldivar's medical report within thirty (30) days. No such testimony was received within the thirty (30) days period. Claimant's counsel then submitted the medical report of Dr. Floresca on September 28, 1988, dated September 21, 1988. Outside of the thirty (30) days time period, however, as the submitted report is probative as to the contested issues. It is marked and admitted into evidence as claimant's exhibit No. 2.

Additionally, closing arguments were received on behalf of both claimant and employer.

The record is now closed.

ISSUES

1. Whether the claimant has pneumoconiosis as defined by the act and regulations.

2. Whether claimant's pneumoconiosis arose out of coal mine employment.

3. Whether claimant is totally disabled.

4. Whether claimant's disability is due to pneumoconiosis.

5. Whether Penn Central Transportation Company is a responsible operator.

Finding of fact, and conclusions of law.

Dated: April 28, 1989.

PARTIES TO THE PROCEEDING

Ms. Sally Mrvos, Court Clerk, U.S. Court of Appeals the Third Circuit.

Mr. Steven Breeskin, Deputy Commissioner, U.S. Dept. of Labor.

Administrative Law Judge, Ben L. O'Brien, U.S. Dept. of Labor.

Lisa L. Lahrman, Executive Counsel, Clerk of the Benefits Review Board, U.S. Dept. of Labor.

Betty J. Stage, Chief Administrative Appeals Judge.

Roy P. Smith, Administrative Appeal Judge.

Leonard N. Lawrence, Administrative Law Judge for Benefits Review Board.

Ms. Kathleen Grady, Deputy Clerk, and Judges.

Present: Sloviter, Chief Judge, Becker, Stapleton, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, and Lewis.

Circuit Judge

Rule 29.(1) for the required listing of parent companies and non-wholly owned subsidiaries:

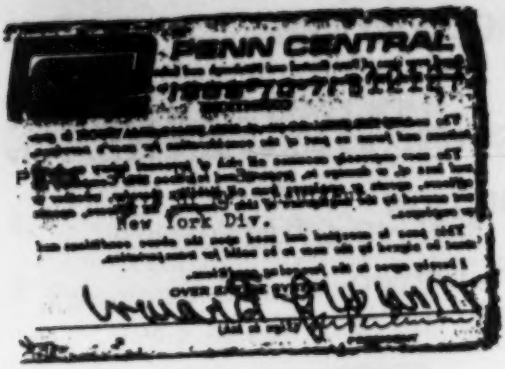
(1) I started working for Pennsylvania Railroad 5/5/1948.

(2) December 31, 1969 The New York Central and the Pennsylvania Railroad merged and was called Penn Central Transportation Co.

(3) In 1976 Penn Central claimed bankruptcy and they turned the men over or leased us over, rather, to Conrail Railroad.

(4) Conrail leased some of the men over to Amtrak, that was the change.

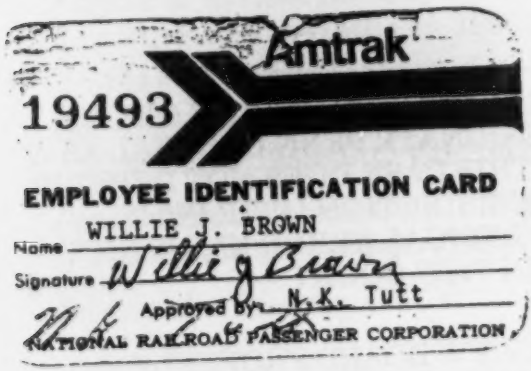
BEST AVAIL



Penn Central No. B121271. **Work Pass** 1969, 70, 71. Over - entire system conditions for New York Division are on back.

Men were sent anywhere they were needed with room and board paid by company.

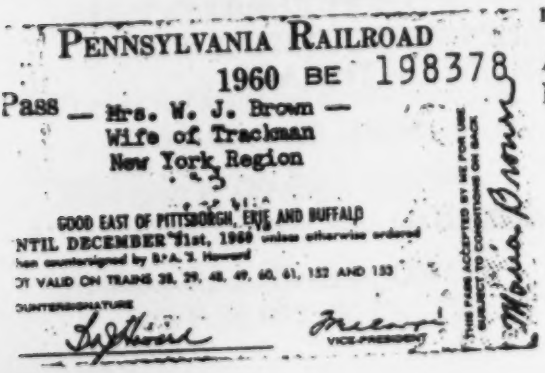
Pennsylvania Railroad pass 1960 (back with conditions). **Work Pass** over entire system



Penn Central and Amtrak **Work Pass** 1976 annual pass No. PC62111.

I still retain all of my passes from 1948 until now. If needed I will send copies.

Also including Conrail Railroad.


PENNSYLVANIA RAILROAD
1960 BE 198378
Pass — Mrs. W. J. Brown —
Wife of Trackman
New York Region
GOOD EAST OF PITTSBURGH, ERIE AND BUFFALO
NTIL DECEMBER 31st, 1960 unless otherwise ordered
NOT VALID ON TRAINS 28, 29, 48, 49, 60, 61, 152 AND 153
COUNTERSIGNATURE
VICE-PRESIDENT
THIS PASS ACCEPTED BY ME FOR USE SUBJECT TO CONDITIONS ON BACK
Mrs. Brown

ABLE COPY

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3011

WILLIE J. BROWN,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF OF THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This Court has jurisdiction over this appeal from a final order of the Benefits Review Board, United States Department of Labor, pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §921(c), as incorporated by section 422(a) of the Black Lung Benefits Act (the "Act"), 30 U.S.C. §932(a). The injury in this case, within the meaning of section 21(c), occurred in the State of New Jersey and the Commonwealth of Pennsylvania. Claimant's petition for review of the Benefits Review Board's decisions of October 28, 1991 and December 30, 1991 was timely filed on January 6, 1992.

The Benefits Review Board had jurisdiction to review the decision of the Department of Labor administrative law judge pursuant to section 21(b) (3) of the Longshore Act, 33 U.S.C.

§921(b) (3), as incorporated. Claimant's appeal of the administrative law judge's decision of April 28, 1989 was timely filed on May 4, 1989. *See* 20 C.F.R. §§725.479, 725.481, 802.205.

STATEMENT OF THE ISSUES

1. Whether the error of the Clerk's Office in failing to serve Penn Central Transportation Company with the petition for review of the Board's decision deprives this Court of jurisdiction over Penn Central.

2. Whether the petitioner's employment as a trackman constitutes "coal mine employment" and, thus, whether petitioner is a "miner" as defined in the Black Lung Benefits Act.

STATEMENT OF THE CASE

A. Course of Proceedings

Willie J. Brown ("Brown") filed an application for benefits under Part C of the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.*, ("the Act") on May 15, 1986. Director's Exhibit ("DX") 1.[1] During the administrative processing of Brown's claim, the Department of Labor ("DOL") identified Penn Central Transportation Company ("Penn Central") as the responsible operator which would be liable for payment of any benefits ultimately awarded to Brown. DX 16. Penn Central contested its identification as the responsible operator. DX 17. Brown's claim was administratively denied by DOL on August 15, 1986. DX 14. DOL concluded that Brown's work as a trackman was not coal mine employment and that Brown failed to establish that he had pneumoconiosis arising out of coal mine employment. *Id.* Brown requested a hearing, which was held before Administrative Law Judge Ben L. O'Brien ("the ALJ") on August 22, 1988 in Beckley, West Virginia.[2] The ALJ issued a Decision and Order denying benefits on April 28, 1989. Brown, representing himself, appealed to the Benefits Review Board ("the Board"), which affirmed the ALJ's denial of benefits in a Decision and Order dated October 28, 1991. The Board summarily denied Brown's

[1] Exhibit numbers refer to exhibits in the official record before the Benefits Review Board. By Order dated February 21, 1992, the Court granted Brown's motion to proceed on the original record.

[2] Brown was represented by counsel at the hearing before the ALJ.

motion for reconsideration on December 30, 1991. Brown, representing himself, filed a timely petition for review with this Court.

In his original petition for review, Brown named only the Director as a respondent.[3] As a result, the Clerk's Office captioned this case as *Brown v. Director, OWCP* and did not designate Penn Central as a respondent. Counsel for the Director contacted the Clerk's Office to alert them to the presence of Penn Central as responsible operator in this case.[4] In a telephone conversation, the Clerk's Office indicated that Penn Central would not be a party to this appeal unless it filed a motion to intervene. By letter dated February 18, 1992, counsel for Penn Central stated that he had received the same information from the Clerk's Office and that Penn Central would not file a motion to intervene. Hence, on February 25, 1992, the Director filed a motion to reform the caption of this case by adding Penn Central as a respondent. After originally being referred to the merits panel on March 2, 1992, this motion was referred to a motions panel of the Court on April 10, 1992. On September 10, 1992, the motion was referred back to the merits panel, where it is now pending. As per the Order of April 10, 1992, the Director's response brief is due on September 24, 1992.

B. Decisions Below

The sole issue considered by the ALJ was whether Brown qualified as a miner under the Act. Applying the three-prong test enunciated by the Board in *Whisman v. Director, OWCP*, 8 Black Lung Rep. (MB) 1-96 (Ben. Rev. Bd. 1985), the ALJ found that Brown did not work at or around a coal mine or coal preparation facility (the "situs" test); that the coal that Brown cleaned up or unloaded in the course of his duties as a trackman was already fully processed and in the stream of commerce (the "status" test); and that Brown's duties as a trackman were not integral to the extraction or preparation of coal (the "function" test). Thus, the ALJ found that Brown

[3] Subsequently, in a letter dated February 26, 1992, Brown attempted to add Penn Central as a respondent.

[4] This case was defended before both the ALJ and the Board by Penn Central. The Director did not appear at the hearing before the ALJ and filed a letter of non-participation with the Board.

was not a miner under the Act. Accordingly, benefits were denied.

On appeal, the Board affirmed the ALJ's findings under each prong of the *Whisman* test as supported by substantial evidence. Hence, the Board affirmed the ALJ's denial of benefits on the basis that Brown was not a miner. The Board also summarily denied Brown's motion for reconsideration.

C. Statement of the Relevant Facts

Brown testified that he was employed as a trackman[5] for the Pennsylvania Railroad and its successors, including Penn Central, Conrail and Amtrak, from 1948 until 1982 on the New York Division (later renamed the New Jersey Division). Hearing Transcript ("Tr.") at 20-22. He testified that his duties involved cleaning and repairing railroad tracks and station facilities. *Id.* He also stated that his duties included unloading coal at the heating plant for the Pennsylvania Station in Newark, New Jersey ("Newark Penn Station"). Tr. at 24, 29-30. Although he never worked in an underground coal mine or at a strip mine, Tr. at 33, Brown testified that he was exposed to coal dust while cleaning up coal that had spilled along the tracks or that had been spilled in a derailment and while unloading coal for the heating plant at Newark Penn Station. Tr. at 29-30, 32-33, 34. He also testified that he could not differentiate raw and processed coal and that he did not know what a tipple, colliery or breaker were. Tr. at 23, 33.

William M. Worthington ("Worthington"), a systems and track analysis engineer for Conrail, testified at a deposition that the duties of a trackman included installing ties, surfacing track, working derailments, general cleanup and assisting in inspections. Employer's Exhibit ("EX") 9 at 11. Worthington further testified that there were no coal mines, collieries, breakers or coal processing plants on the New York Division, which extends from Albany, New York to Holmesburg, Pennsylvania, at any time since 1948. EX 9 at 8, 13. This testimony was corroborated by the deposition testimony of Frederick Day ("Day"), an assistant engineer for

[5] Brown also testified that he worked as a welder beginning in 1973. Tr. at 37. The record does not indicate what his duties as a welder were, or whether they were performed in addition to or in lieu of his duties as a trackman.

bridges and buildings for Conrail. EX 8 at 6-7. Finally, Worthington testified that all coal used at generating plants was processed and that no raw coal was housed, stored or transported on the New York Division.[6] EX 9 at 12-15, 21.

STATEMENT OF RELATED CASES

This case has not been before this Court prior to the present appeal. To the best of the Director's knowledge, there is no case pending before the Court, or about to be presented, which addresses similar issues.

STANDARD OF REVIEW

The Board reviews ALJ decisions to determine if they are supported by substantial evidence and in accordance with law. 33 U.S.C. §921(b) (3), as incorporated by 30 U.S.C. §932(a). This Court, in turn, reviews Board decisions to determine if the Board properly applied its standard of review. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162 (3d Cir. 1986). On questions of law, the Court's review is plenary. *Carozza v. U.S. Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984).

[6] Worthington testified that he could differentiate raw and processed coal based on his previous employment with Bethlehem Steel Corporation. EX 9 at 8-9.

ARGUMENT

I

THE ERROR OF THIS COURT'S CLERK'S OFFICE IN FAILING TO DESIGNATE PENN CENTRAL AS A RESPONDENT IN THIS CASE DOES NOT DEPRIVE THIS COURT OF JURISDICTION OVER PENN CENTRAL; THAT CLERICAL ERROR IS SUBJECT TO CORRECTION BY THIS COURT.

The Director, Office of Workers' Compensation Programs, is currently the sole respondent in this case. We have filed a motion to reform the caption by adding Penn Central as a respondent. By Order dated September 10, 1992, a motions panel of the Court referred this motion to the merits panel. We now renew our request that Penn Central be designated as a respondent in this case.

In response to our original motion, Penn Central argued that because Brown failed to name them in his original petition for review, they cannot now be named as a respondent. The Clerk's Office's statement that Penn Central could only participate by intervening appears to reflect the same view. Both the Clerk's Office and Penn Central, however, appear to labor under the assumptions that Brown could take his appeal against only the Director and that, in fact, he did so. Neither assumption is correct. Mr. Brown's original petition for review was filed *pro se,* and gives no indication on its face that Mr. Brown is somehow attempting to release Penn Central from potential liability.[7] Moreover, even assuming that Brown did intend to appeal against the Director alone, he could not do so, since he cannot choose which party would be liable for payment of benefits.

Unlike most civil cases, an individual applying for black lung benefits cannot choose the party from which he will

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[7] The effect of the ALJ and Board decisions, of course, is to release Penn Central from liability on the basis that Brown is not entitled to any black lung benefits. That issue, discussed below in Argument II, is different from whether Penn Central can be released from potential liability (*i.e.*, from liability if Brown is found entitled to benefits) simply by a clerical error.

recover. For example, in a personal injury case with multiple tortfeasors, the plaintiff can choose which tortfeasors to sue. Those sued would be jointly liable. Similarly, if, at the trial level, verdicts were returned in favor of the defendants, the plaintiff would have the choice of which, if any, defendants to appeal against. By contrast, if a claimant is found to be entitled to benefits under Part C of the Act,[8] those benefits will be paid by either the Black Lung Disability Trust Fund ("Trust Fund") or by a responsible operator.

During the administrative consideration of Brown's claim, DOL identified Penn Central as the putative responsible operator and notified it of the claim. DX 16; *see* 20 C.F.R. §725.412. Penn Central contested its status as responsible operator,[9] and also controverted Brown's entitlement to benefits. Brown's claim was administratively denied by DOL and was also denied by the ALJ. Brown then appealed to the Board, which affirmed the denial of benefits and also denied Brown's motion for reconsideration. Penn Central appeared and defended the claim before both the administrative law judge and the Benefits Review Board.

A "responsible operator" is defined in the applicable regulations. The owners and operators of coal mines and coal preparation facilities, as well as certain coal mine construction and transportation employers, may qualify as operators under the Act. 20 C.F.R. §725.491. A railroad employer like Penn Central may meet this test and be considered an operator. *Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144, 1150 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991). A responsible operator is the employer for whom a miner most recently engaged in coal mine employment for at least one year. 20 C.F.R. §725.492(a) (1). In addition, a responsible operator must have been the owner or operator of a coal mine or preparation facility or been a coal mine construction or transportation employer for any period subsequent to June 30, 1973, 20 C.F.R. §725.492(a)

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[8] Part C is the portion of the Act administered by the Department of Labor; it covers claims filed after December 31, 1973. Claims filed prior to that date were covered under Part B of the Act, which was administered by the Social Security Administration ("SSA"), or section 415, 30 U.S.C. 925, which was administered in part by SSA and in part by DOL.

[9] This issue has never been adjudicated.

(3), and the miner must have worked for the resposible operator for at least one day subsequent to December 31, 1969. 20 C.F.R. §725.492(a)(2).

The liability of the Black Lung Disability Trust Fund for payment of benefits under Part C of the Act is similarly determined by statute and by regulation. Where it has been determined that no operator can be held liable for the payment of benefits, the ultimate liability will lie with the Trust Fund. 26 U.S.C. §9501(d)(1)(B); 20 C.F.R. §725.490. Also, if a claim meeting certain conditions is approved pursuant to section 435 of the Act, 30 U.S.C. §945, liability transfers from the responsible operator to the Trust Fund.[10] 20 C.F.R. §725.496. Otherwise, liability lies with the responsible operator. 20 C.F.R. §725.490. The Act makes no provision, however, for a claimant's election to recover benefits from a party other than the one specified by regulation. In short, it is not within a claimant's prerogative to choose which party will pay benefits.

In this case, the Department named Penn Central as the putative responsible operator. Under the applicable regulations, Penn Central, once named, is a party to this case. 20 C.F.R. §725.360(a)(3). Although Penn Central has contested their designation as responsible operator, that issue has never been resolved by the administrative law judge, and is not now before this Court. Thus, if Brown is ultimately awarded benefits, liability will lie with Penn Central unless that company can successfully challenge the Department's designation. It cannot evade this liability on the basis that Brown erroneously failed to name Penn Central as a respondent in his petition for review or based on its failure to participate in the appeal. Hence, we submit that Brown cannot elect to appeal against only the Director.

This analysis of Black Lung Benefits Act procedures is borne out by the responsibilities that the Act places on the Clerk's office once a petition for review is filed. The incorporated provision of the Longshore and Harbor Workers'

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[10] The Trust Fund will also pay "interim" benefits in cases where the Department of Labor has determined that the claimant is eligible for benefits, but the responsible operator has controverted claimant's entitlement 20 C.F.R. §725.522(b). If, however, the responsible operator is ultimately determined to be liable, it must reimburse the Trust Fund for the benefits paid. 20 C.F.R. §725.602(a).

Compensation Act, 33 U.S.C. §921(c), provides that appellate review of a Board order may be obtained simply by filing a written petition praying that the Board's decision be modified or set aside. "A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties..." 33 U.S.C. §921(c), as incorporated by 30 U.S.C. §932 (a) (emphasis added). When Brown filed his petition for review, Penn Central was already a party to this case. Contrary to the position of the Clerk's office, Penn Central does not have to file a motion to intervene.[11] Instead, it was the responsibility of the Clerk to serve the petition on both the Director and Penn Central.

Penn Central has asserted, in response to the Director's motion to reform the caption, that Mr. Brown's petition for review is insufficient to confer jurisdiction over Penn Central, and that it did not receive sufficient notice of Mr. Brown's appeal. We have demonstrated why Mr. Brown's failure to properly designate the responding parties in this case is not a jurisdictional defect. Although Rule 3(c) of the Federal Rules of Appellate Procedure imposes a jurisdictional requirement that all appealing parties be named with specificity in a notice of appeal, *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2408 (1988), there is no such requirement for the naming of responding parties. *Oil, Chemical & Atomic Workers Local 6418 v. N.L.R.B*, 694 F.2d 1289, 1299 (D.C. Cir 1982); *see also* Fed. R. App. p 3(d), as incorporated by Fed. R. App. p. 15(c) (failure of Clerk to serve notice of appeal on all parties does not effect validity of appeal).[12]

Furthermore, contrary to Penn Central's assertion in its response to the Director's motion to reform caption, Penn Central was on notice of its continuing status as a respondent in this case, despite Brown's failure to name it as a respondent in his original petition for review, simply by virtue of the nature of proceedings under the Act. Penn

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11 Penn Central has declined to file such a motion. The Director is now defending the claim before this Court, thereby saving Penn Central substantial time and resources.

12 Although Fed. R. App. P. 15(a) states that the petition shall "designate the respondent," there is no indication that this is the type of jurisdictional requirement that would affect the Court's ability to hear Brown's appeal, *see Wisniewski v. Director, OWCP*, 929 F.2d 952, 954-956 (3d Cir. 1991), or to grant Brown the relief he seeks, namely, benefits payable by his former employer, Penn Central.

Central was on notice of its potential liability from the time it was notified of the existence of Brown's claim. Although Penn Central has contested its designation as responsible operator, it has never been dismissed from this case. Since, as we have shown above, Brown cannot elect the party from which he seeks to recover, Penn Central cannot reasonably claim that it believed that it was "off the hook" and need not defend this appeal merely because Brown did not name it as a respondent in his petition given the structure of the Act and the regulations, the identity of the parties to this appeal was clear from the outset.[13] Moreover, Penn Central received notice of this appeal well in advance of any briefing deadline. Thus, it cannot show any prejudice from Brown's failure to name it in his original petition for review.

Under 33 U.S.C. 921(c), the "error" in failing to designate Penn Central as a respondent in this proceeding is properly charged to the Office of the Clerk. This error is both excusable, given the paucity of information available to the Clerk's Office when the petition for review was acknowledged, and non-jurisdictional. Therefore, the Director respectfully requests that the Court correct the action of the Clerk's Office and designate Penn Central as a respondent in this appeal.

II

THE BENEFITS REVIEW BOARD PROPERLY AFFIRMED, AS SUPPORTED BY SUBSTANTIAL EVIDENCE, THE ALJ'S FINDING THAT BROWN WAS NOT A MINER UNDER THE ACT.

The Act provides benefits to coal miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. The sole issue addressed by the ALJ and the Board, and, thus, the sole issue on the merits before this

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[13] Similarly, in both of the cases cited by Penn Central, responding parties which were not specified in the notice of appeal did not lack notice because they were deemed to have actual knowledge of their status. *Longmire v. Guste*, 921 F.2d 620, 623 (5th Cir. 1991); *Chathas v. Smith*, 848 F.2d 93, 94 (7th Cir. 1988).

Court, was whether Brown was a "miner" as defined in the Act. Section 402(d) of the Act defines a miner as

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. §902(d); *see* also 20 C.F.R. §§725.101(a) (26), 725.202(a).

This Court has developed a two-part test for determining whether an individual qualifies as a miner under the Act. First, he must work in or around a coal mine or coal preparation facility (the "situs" test); second his work must be integral to the extraction or preparation of coal and not ancillary to its delivery and commercial use (the "function" test). *Stroh v. Directors OWCP*, 810 F.2d 61, 63 (3d Cir. 1987).[14]

A claimant, including a transportation worker, must satisfy both tests to qualify as a miner. *Id.* Moreover, the claimant bears the burden of proving that he worked as a miner. 20 C.F.R. §718.403; *see Hanna v. Directors, OWCP*, 860 F.2d 88, 91 (3d Cir. 1988) ("[B]oth elements of that test must be proven before a claimant can be determined eligible for benefits under the Act"), *Griffith v. Director, OWCP*, 868 F.2d 847, 848 (6th Cir. 1989) (claimant bears the burden of proving the length of his coal mine employment). Applying *Stroh* to the present case, it is clear that Brown has not proven either requirement.

Brown cannot satisfy the function requirement. To satisfy the function requirement, Brown's job must have been integral to the extraction or preparation of coal and not ancillary to its commercial delivery. *Stroh*, 810 F.2d at 63. It is clear that Brown's work never involved the actual

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[14] Although both the ALJ and the Board applied the three-part *Whisman* test rather than the two-part test of *Stroh*, this error was harmless. As the Court noted in *Stroh*, the "status" requirement of *Whisman* is subsumed in the "function" requirement of *Stroh*. 810 F.2d at 64. Moreover, the ALJ's factual findings make it clear that Brown is not a miner, regardless of the test used.

extraction of coal from the ground. Moreover, his work does not fall within the definition of "preparation" of coal. Coal preparation includes

> the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of ... coal, and such other work of preparing ... coal as is usually done by the operator of the coal mine.

30 U.S.C §802(i); *see also* 20 C.F.R. §725.101(a)(25). The preparation process is complete when the coal is removed from the tipple and loaded "for transport into the stream of commerce." *Hanna,* 860 F.2d at 93. Activities beyond that point, related to the delivery of fully processed coal to the ultimate consumer, do not fall within the definition of coal preparation. *Id.; Stroh,* 810 F.2d at 64; *Southard v. Director, OWCP,* 732 F.2d 66, 69-70 (6th Cir. 1984); *accord Pennsylvania Electric Co. v. FMSHRC,* 969 F.2d 1501 (3d Cir. 1992).

Applying these principles to this case, it is clear that Brown was not engaged in coal preparation. The record demonstrates that only processed coal was transported on the New York Division. EX 9 at 12-15. This coal had already been removed from the tipple and loaded for transport into the stream of commerce. Thus, when a coal train derailed on the New York Division and Brown helped clean up the spilled coal, his work was ancillary to the delivery of coal to consumers. Likewise, his work unloading coal for the heating plant at Newark Penn Station was not integral to the extraction and preparation of coal. Brown unloaded fully processed coal for use in generating heat for the train station, a step in the delivery of coal to a consumer. *See Foreman v. Director, OWCP,* 794 F.2d 569, 571 (11th Cir. 1986) (individual employed by coal consumer who loaded coal into boiler of power plant not engaged in coal mine employment); *Southard, supra,* 732 F.2d at 69 (unloading and stockpiling of coal for a retailer not coal preparation because the coal was already prepared and in the stream of commerce). There is no evidence that Brown's other duties as a trackman and welder had any connection to the extraction or preparation of coal. Thus, Brown was not engaged in the extraction or preparation of coal; his work was merely ancillary to the commercial delivery and use of fully processed coal. Hence,

the ALJ properly found that he does not satisfy the function requirement.

It is similarly clear that Brown cannot independently meet the situs requirement.[15] He testified that he never worked in a coal mine, underground or surface, Tr. at 33, and there is no evidence of record that he ever worked in a coal mine. Indeed, there were no coal mines or collieries along the entirety of the New York Division. EX 9 at 13; EX 8 at 6-7. The only places where Brown was exposed to coal dust were the track locations where he cleaned up spilled coal and at the heating plant for Newark Penn Station. None of these places were coal mines or coal preparation facilities.

For the purposes of the Act, a coal mine is defined as

> an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, ... used in the work of extracting (coal) ... and in ... the work of preparing the coal so extracted, and includes custom coal preparation facilities.

30 U.S.C. §802(h) (2); *see also* 20 C.F.R. §725.101(a) (24). The record does not identify the precise locations at which Brown cleaned up spilled coal, but there is no evidence that any of these locations were used for the extraction or preparation of coal. Moreover, Worthington and Day, the Conrail officials, both stated that there were no coal mines or coal preparation facilities on the New York Division. EX 9 at 13; EX 8 at 6-7. Thus, the ALJ properly found that Brown's work cleaning up spilled coal was not performed in or around coal mines or around coal preparation facilities. As to the heating plant for Newark Penn Station, Brown's duties in unloading coal were clearly ancillary to the commercial use of coal. The plant burned processed coal, apparently to provide heat and electricity for the train station. EX 9 at 21. The plant was the ultimate consumer of the coal Brown unloaded and there is no evidence that any coal preparation activities were carried on there. Thus, the ALJ acted properly in

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[15] If Brown had met the "function" requirement, *i.e.*, performed work which was integral to the extraction or preparation of coal, the area in which he worked could have been considered a covered "situs," under the "functional analysis" espoused by this Court in *Pennsylvania Electric Co. v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992).

concluding that Brown's work at the heating plant was not in or around a coal mine or coal preparation facility. Since Brown did not work in or around a coal mine or coal preparation facility, he does not meet the situs requirement and he cannot qualify as a miner under the Act. *Stroh, supra.*

Since Brown satisfied neither the situs nor the function requirement, he cannot be considered a miner under the Act and is not eligible for benefits. Therefore, the Court should affirm the denial of benefits. In the event that the Court does not affirm the ALJ's finding that Brown was not a miner, then this case must be remanded for consideration of the merits of Brown's claim and of the responsible operator issue, as neither the ALJ nor the Board addressed these issues.

CONCLUSION

The Director respectfully requests that the Court affirm the denial of benefits in this case. The ALJ rationally found that Brown was not a miner under the Act and that finding was properly affirmed by the Board. The Director also requests that the Court designate Penn Central as a respondent in this case. If the Court does not affirm the denial of benefits, then the Director requests that the case be remanded for consideration of the issue of responsible operator and for consideration on the merits.

Respectfully submitted,

MARSHALL J. BREGER
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

MICHAEL J. DENNEY
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Attorneys for the Director, Office
of Workers' Compensation Programs

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 1992, two copies of the foregoing pleading were served by mail, postage prepaid, on the following:

Willie J. Brown
312 Harper Heights Road
Beckley, West Virginia 25801

J. Lawson Johnston, Esq.
Dickey, McCamey & Chilcote
Two PPG Place
Suite 400
Pittsburgh, Pennsylvania 15222-5402

BARRY H. JOYNER
Attorney
U.S. Department of Labor

APPENDIX CONTAINING THE DOCUMENTS
SET FORTH IN RULE 14(K)
PHYSICIANS PRIMARY HEALTH CARE, INC.

February 12, 1988

RE: Willie J. Brown
SS: 260-01-1809
DOB: 11-24-22

To Whom It May Concern:

This is in reference to the above named patient, who is a sixty-five year old black male, who has been at my office for the second time on February 11, 1988 for re-evaluation of his occupational lung disease.

CLINICAL HISTORY

According to the patient, he has had a long standing history of progressive shortness of breath, spells of coughing and progressive fatigue for approximately eight years. His cough is usually nonproductive. He is easily exhausted and tired that walking a distance of one hundred yards on a level ground is difficult because of dyspnea. He is unable to climb up a hill or walk up a flight of stairs without resting. Recently, he has been complaining of tightness on both sides of the chest, aggravated by coughing. He takes Dilor G, one tablet four times daily. He could not perform any usual or ordinary physical exertion because of smothering.

PAST HISTORY

No history of heart disease, high blood pressure or diabetes mellitus. No history of asthma. No previous injuries. He was treated for peptic ulcer disease. He stated he worked 34 years in and around the mines as a trackman for the railroad, which exposed him to the hazards of the coal dust.

SOCIAL HISTORY

He is a nonsmoker. Denies drinking alocholic beverages.

FAMILY HISTORY

Noncontribuatory

PHYSICAL EXAMINATION

When the patient was seen, he was conscious and in mild respiratory difficulty.

VITAL SIGNS	T	98.8
	P	64
	R	24
	BP	180/108
	WT	162
	HT	5'8
HEAD	Normocephalic.	
ENT	Unremarkable.	
NECK	No palpable masses. Carotid arteries normal. Jugular vein visible but not distended.	
CHEST	Increased AP diameter.	
LUNGS	Bilateral rhonchi breathing with diminished breath sounds bilaterally.	
HEART	Regular sinus rhythm, the sounds are faint.	
ABDOMEN	No mass, no tenderness.	
EXTREMITIES	No edema, mild clubbing of the fingers.	
LABORATORY	Enclosed.	
DIAGNOSIS	1. Coal Worker's Pneumoconiosis.	
	2. Diffuse Chronic Interstitial Lung Disease.	
	3. Peptic Ulcer Disease, by history.	

OPINION AND RECOMMENDATIONS

The above trackman has shown clinical evidence of an occupational lung impairment, confirmed by the Sphirometric Studies, revealing an FEV1 of 1.67 1/1 sec and an FEV3 of 213 1/3s, consistent of Severe Pulmonary Defect and moderate restrictive defect. The ABG showed a PO2 of 32.2. The chest x-ray showed minimal Chronic Diffuse Interstitial Lung Disease with Aortic Athrosclerosis. The EKG suggests a right cardiac strain, indicative of chronic lung disease.

The above findings strongly indicates his pulmonary impairment is directly related to the exposure of the hazards of his occupation as a trackman and that he is totally and

permanently disabled from his gainful employment as a trackman or its comparible job.

I trust that this examination is helpful in assisting his claim.

Sincerely yours,

Jose P. Floresca, M.D.

JPF/aln
Enclosures
CC: 2

PHYSICIANS PRIMARY HEALTH CARE, INC.
BECKLEY, WV 25801
JOSE P. FLORESCA, M.D.

September 21, 1988

Belinda S. Morton
Attorney At Law
106 Maple St.
Fayetteville, WV 25840

RE: Willie J. Brown
SS: 260-01-1809

Dear Ms. Morton:

This is in response to your letter, dated September 5, 1988, requesting a review and comment to the medical report of Dr. Zaldivar. Upon reviewing the medical report, he diagnosed the case as asthma. He mentioned that the patient had worked in the mines for thirty-four years and had a history of shortness of breath since 1979. He also mentioned of exertional dyspnea in walking up stairs and walking one hundred yards and no family history of asthma or emphysema was noted. The sphirometric studies done at his office on August 3, 1988 showed an FEV1 of 1.4 before bronchodilator and 1.54 after inhalation of bronchodilator. His comment was Moderate Irreversible Obstruction Airway Trapping. His chest x-ray reading revealed small opacities, Category 0/1, t/t and no other examinations were performed such as sputum exam, CBC or serum IGE.

In my opinion and by definition of asthma, it is a reversible airway obstruction not due to any other disease and categorized by hyperirritability of the airway. Usually diagnosed by the following: (1) Clinical history of paroxysmal attacks of wheezing, not a continuous progressive shortness of breath, (2) presence of family history of asthma approximately one half of the family members, (3) blood eosinophila of more than 250-400 cu/mm., (4) sputum eosinophila with Charcot-Leyden crystals (5) Dynamic Lung Volume, (6) Flow Rate, (7) improvement of airway obstruction with aerosolized bronchodilators.

My medical opinion and comment to the above medical report, is that the chronic lung disease this patient is experiencing or constitutional symptoms are more related and induced by the prolonged exposure to an offending substance due to his occupation. He had an exposure to the coal dust for approximately thirty-four years. He has a history of a slow, progressive dyspnea for nine years. Asthma usually has a paroxysmal attacks with periods or intervals of having no symptoms and improvement with bronchodilators. The chest x-ray, as read by Dr. Bassali and Dr. Zaldivar, showed opacities which are discreet nodular pulmonary fibrosis and commonly associated with Coal Workers' Pneumoconiosis. The sphirometric studies showed airway obstruction or pulmonary defect that have not responded to aerosolized bronchodilators. Although blood and sputum examinations for eosinophilia and serum IGE determination were not done with this patient, I am fully convinced that these tests are negative on the above miner. I have a report of the CBC, which will be enclosed with this report.

Therefore, based on the medical report of Dr. Zaldivar, the chest x-ray of Dr. Bassali, the sphirometric studies of Dr. Daniels and the clinical evidences that I have gathered from the patient himself, with medical certainty, the above findings strongly indicate that his lung disorder is directly related to the heavy exposure of coal dust from his occupational environment. So, I feel, he should be totally and permanently disabled from his usual and regular gainful employment.

I trust that this report should be verified by medical references to establish the above comment.

Sincerely yours,

Jose P. Floresca, M.D.

JPF/aln
Dictated 9/21/88
Transcribed 9/21/88

Belinda S. Morton
Attorney at Law
106 Maple Street, Box 636
Fayetteville, WV 25840
(304) 574-3000

July 12, 1988

Willie Brown
Rt. 3, Box 42
Beckley, WV 25801

RE: Black Lung

Dear Mr. Brown:

Department of Labor has requested that you be examined by Dr. George Zaldivar, his office is located at 3100 McCorkle Avenue, Southeast, Charleston, West Virginia. Your appointment is scheduled for August 3, 1988 at 7:30 a.m.

This is a special appointment that was made for you. Please be absolutely certain to keep this appointment exactly at the time and date scheduled as a failure to do so would seriously delay the settlement of your case.

During this medical examination, you should fully explain to the doctor all of the problems that you are presently having with your disability, and you should cooperate fully with his examination of you.

If you have any questions concerning this matter, please feel free to contact my office. Necessary expenses incurred in connection with this examination will be paid for by the employer.

ANY STATEMENT MADE TO THEIR DOCTOR CAN BE USED AS EVIDENCE AGAINST YOU IN YOUR CASE.

Sincerely,

BELINDA S. MORTON, ESQ.

BSM/syj

George L. Zaldivar, M.D., Ltd.
Lung Diseases and Internal Medicine
Suite 404
3100 McCorkle Avenue, S.E.
Charleston, West Virginia 25304

History and Physical Examination
Willie J. Brown
Penn Central Transportation
Federal Black Lung Claim
Case No.: 87-BLA-1264
OWCP No.: 260-01-1809
Date of Examination: 8/3/88

Mr. Brown is a 65 year old Negro male.

CHIEF COMPLAINT: Shortness of breath and cough.

HISTORY OF PRESENT ILLNESS: He has been short of breath since 1979. When he walks up stairs he is short of breath. Walking 100 yards on the level causes him to be short of breath. Since 1979 he has used two pillows to sleep because of shortness of breath. No swelling of his feet or ankles. Wheezing is noted at all times, however, it is worse in hot weather. Cough productive of sputum has been present since 1981. The last chest pain he had was in 1979. At that time he also had a stomach ulcer. He hasn't had any chest pain since.

PAST MEDICAL HISTORY: Medications - Dylor G 1 tablet q.i.d., Theophylline Elixir which he takes every three hours, Primatene mist. According to him the Primatene mist helps him. Allergies - None. Habits - He states that he smoked for one year in 1981 at one pack of cigarettes per day. He quit at that time. Surgeries - None.

WORK HISTORY: He worked in the mines for 34 years, quitting in 11/82. He states that he quit his job because he couldn't perform it due to shortness of breath. All of the time in the mines he was a trackman. He repaired track and cleaned track with rakes and shovels. However, he was also pulled to do other jobs such as a truck driver outside the mines in 1965. He has been a welder. He has driven different kinds of equipment. However, he said that his main job was as a trackman.

PERSONAL AND SOCIAL HISTORY: He is married and has had three children.

FAMILY ILLNESSES: There is no family history of asthma or emphysema.

PERSONAL ILLNESSES: No personal history of asthma or emphysema. He has been told that he has Black Lung. There is no history of heart disease.

REVIEW OF SYSTEMS: Weight has remained stable. Eyes - No complaints now. He says that while welding he had some damage to his eyes. Ears - No complaints. Mouth - He does not wear dentures. Lungs - As stated. Heart - No complaints. GI - He has had stomach ulcers in the past. GU - No complaints. MS - No complaints.

PHYSICAL EXAMINATION: Height 66", weight 158#, BP 160/90 in the right arm while sitting, primarily, pulse 70, respiration 14. In general, he is an alert, well developed Negro male in no acute distress. Eyes - Fundi are intact. Ears - Tympanic membranes are normal. Mouth - Oropharynx is healthy. He is edentulous. Neck - No bruits heard, no mass palpated. Heart - S1 is equal to S2 without murmurs or gallops. The lungs are clear to auscultation without wheezes, crackles or rales even before the breathing test was performed. The abdomen showed no mass or tenderness. Extremities - No edema of the legs or clubbing of the fingers. Radial and popliteal pulses are 2+ and equal. Genital and rectal examination were not performed.

IMPRESSION:
1. History of shortness of breath
2. Normal examination of the lungs.
3. Hypertension on this examination.

George L. Zaldivar, M.D., F.C.C.P.

GLZ/lyl

George L. Zaldivar, M.D., Ltd.
Lung Diseases and Internal Medicine
Suite 404
3100 McCorkle Avenue, S.E.
Charleston, West Virginia 25304

August 17, 1988

Mr. John T. Pion, Attorney
Dickie, McCamey & Chilcote
Suite 400
Two PPG Place
Pittsburgh, PA 15222-5402

Re: Mr. Willie J. Brown
SS#: 260-01-1809

Dear Mr. Pion:

Enclosed you will find the history and physical examination and all laboratory information obtained from Mr. Brown during his visit to my office on 8/3/88. I have also reviewed the information which you sent me.

There is a letter from Dr. Jose Floresca who stated that there was coal worker's pneumoconiosis and severe pulmonary impairment resulting from it. This was dated 2/12/88.

Chest x-ray read by Dr. Dominic Gaziano dated 6/18/86. He read it as no evidence of pneumoconiosis.

Chest x-ray from Dr. C. R. Daniel of 6/18/86. He read it as U 1/0 as well as emphysema.

Blood gas study of 6/18/86 from Dr. Daniel shows a PH of 7.41, PC02 of 40 and P02 of 79 at rest. With exercise the PH was 7.32, PC02 of 37 and P02 of 92. These are normal blood gases.

Ventilatory study from Dr. Daniel of 6/18/86 shows a vital capacity of 2.7 or 80% of predicted with an FEV 1 of 1.65 for an FEV 1% of 61 representing mild airway obstructions. The tracings were acceptable.

Discharge summary of 4/30/86. At that time he had acute pancreatitis which is a disease unrelated to coal mine work.

Chest x-ray read by Dr. Bassali dated 5/9/86 as minimal chronic interstitial disease.

Blood gases from Dr. Floresca dated 5/7/86 shows a PH of 7.36 with a PCO2 of 63.2 and PCO2 of 37. These blood gases are abnormal, but it has come to my attention that Dr. Floresca's blood gases have been performed improperly for several years until 1988. Up to that time he was improperly calibrating the blood gas instrument using a barometric pressure of 740 mm. of mercury which is not the prevailing barometric pressure in Beckley. The barometric pressure there ranges between 697 and 710 mm. of mercury. The improper calibration results in inaccurate blood gas results. These gases cannot be accepted as accurate.

Dr. Floresca reported the ventilatory studies with a vital capacity of 2.55 or 64% of predicted and an FEV 1 of 1.67 for an FEV 1% of 65. The tracings were not submitted and therefore I cannot make any statement as to the adequacy of this study.

My own findings were as follows.

1). Summary of the history and physical examination as listed under "impression".

2). Normal hemoglobin.

3). Subtherapeutic theophylline level.

4). Only fair effort during the spirometry which shows the presence of moderate irreversible airway obstruction.

5). Mild degree of air trapping by lung volume without any restriction of total lung capacity.

6). Normal diffusing capacity.

7). Low carboxyhemoglobin level of a current non-smoker.

8). No radiographic evidence of pneumoconiosis.

9). Normal resting and exercise blood gases (see comments).

COMMENTS: Mr. Brown complained of dizziness at one minute. The blood pressure was normal and the heart rate was 65. Because he was unsteady on the bicycle I had no choice but to terminate the exercise at that point. The blood

gases were entirely normal and therefore hypoxemia was not at all related to the episode. The episode appeared to have been due to anxiety given the normal blood pressure and heart rate.

In summary judging from the information which you sent me and my own information, Mr. Brown has a history compatible with asthma. He has wheezing affected by weather changes. He has noticed that inhalants such as Primatene Mist helps his breathing. He is not taking sufficient medications which is the reason for the very low theophylline level. Mr. Brown does not have coal worker's pneumoconiosis. Asthma is a disease of the general population absolutely unrelated to coal mine work.

From the pulmonary standpoint as of the time Mr. Brown was in my office he had moderate pulmonary impairment which would prevent him from performing the job of a trackman as he described it to me. He can however perform the job of a driver. Perhaps with more intensive treatment of the asthma he might improve his ventilatory capacity.

In conclusion Mr. Brown has asthma. He does not have coal worker's pneumoconiosis. From the pulmonary standpoint as of the time of my examination he had moderate impairment which would prevent him from performing the job of a trackman.

Sincerely,

Geroge L. Zaldivar, M.D., F.C.C.P.

GLZ/mem

As an appendix to the opinion of U.S. Court of Appeals for the Circuit. The opinion of the District Court or the opinion of the OWCP as required by Rule 14.1(k).

DATE: April 28, 1989

CASE NO.: 87-BLA-01264

OWCP NO.: 260-01-1809

IN THE MATTER OF

WILLIE J. BROWN,
Claimant

v.

PENN CENTRAL TRANSPORTATION COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

BELINDA S. MORTON, ESQUIRE
For the Claimant

JOHN PION, ESQUIRE
For the Employer

NO APPEARANCE
For the Director

BEFORE: BEN L. O'BRIEN
United States
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et seq.* In accordance with the Act and the Regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing in order to determine the Claimant's eligibility for benefits under the Act.

Benefits under the Act are awardable to Miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of Miners whose death or total disability was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as Black Lung.

A formal hearing of this case was held in Beckley, West Virginia on August 22, 1988, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the Regulations issued thereunder. The Regulations referred to herein are contained in Title 20 of the Code of Federal Regulations.

The following abbreviations will be used in this Decision: DX for Director's Exhibit, CX for Claimant's Exhibit, EX for Employer's Exhibit and Tr. for Transcript of the Hearing.

At the hearing, Claimant was granted leave to submit rebuttal testimony as to Dr. Zaldivar's medical report within thirty days. No such testimony was received within the thirty day time period. Claimant's counsel then submitted the report of Dr. Floresca on September 28, 1988, outside of the thirty day time period. However, as the submitted report is probative as to the contested issues, it is marked and admitted into evidence as the contested issued, it is marked and admitted into evidence as Claimant's Exhibit No. 2. Additionally, closing arguments were received on behalf of both Claimant and Employer. The record is now closed.

ISSUES

1. Whether the Claimant has pneumoconiosis as defined by the Act and the Regulations;

2. Whether Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether Claimant is totally disabled;

4. Whether Claimant's disability is due to pneumoconiosis;

5. Whether Penn Central Transportation Corporation is a responsible operator.

BACKGROUND AND HISTORY

The Miner, Willie J. Brown, was born on November 24, 1922. He completed the fourth grade. Claimant worked as a railroad trackman from 1948 to 1982.

DATE OF FILING

Claimant filed an application for benefits under the Act on May 15, 1986 (DX-1). The claim was denied on August 15, 1986 (DX-14). Claimant thereupon requested the present hearing (DX-15).

COAL MINE EMPLOYMENT

To establish that Claimant was a Miner within the meaning of the Act, he must prove the following:

1. The work was done at a place where coal was being processed rather than at a place where the coal was a finished product in the stream of commerce (status of the coal test);

2. The "Miner" was performing a function integral to the extraction or preparation of coal, not ancillary to the delivery and commercial use of processed coal (function test); and

3. The "Miner's" work occurred in or around a coal mine or coal preparation facility (situs test). *Whisman v. Director,* 8 BLR 1-96 (1985).

Claimant was employed as a trackman with Penn Central Transportation Corporation from 1948 to 1982. At the hearing, Claimant testified that coal cars went by on the tracks while he was working (TR. at 21). However, he was unaware of whether the coal that was hauled on the tracks was raw or processed coal (*Id.* at 23). Claimant testified that he never cleaned coal nor did he ever rake coal near a tipple. He did, however, sometime load and unload coal into a furnace and clean train wrecks (*Id.* at 24). Claimant testified that he was exposed to a lot of dust, gas, and smoke while working for the railroad (*Id.* at 26). On cross examination, Claimant was asked:

Q: Do you know what a tipple is? Or a colliery or a breaker?

A: I would say I don't know.

Q: Have you ever been to a tipple or a colliery or a breaker?

A: That's — I don't understand what you mean.

Q: Did you ever work as an underground coal Miner, Mr. Brown?

A: Underground coal Miner?

Q: Yes.

A: No, I worked underground but not as a coal Miner.

Q: Did you ever work in a strip mine operation?

A: No.

(*Id* at 33.)

The record also contains the deposition testimony of William Worthington, a systems engineer and track analyst for Conrail (EX-9), and Frederick Day, an assistant engineer in charge of bridges and buildings for Conrail (EX-8). Both men averred that there were no coal mines or collieries in the area that Claimant worked. Moreover, they testified that the coal that was hauled in Claimant's area was processed coal that was directly consumed.

After considering the above, I find Claimant has not presented sufficient evidence to establish that he was a coal Miner. Claimant has not met the criteria elucidated in *Whisman*. Claimant testified that he did not work as either an undergound Miner or a strip Miner. He further testified that he never raked nor cleaned coal. Moreover, Employer established, through the deposition testimony of Mr. Worthington and Mr. Day, that there were no coal mines or collieries in Claimant's work area. Mr. Worthington and Mr. Day both testified that the only coal hauled in Claimant's area was processed coal. Claimant testified that he sometimes unloaded coal into a pit at the heating plant and he sometimes cleaned coal spills along the tracks (Tr. at 22,

24, 29, 30, 35). However, this coal was already processed and was being hauled to the ultimate consumer, and therefore, does not qualify as coal mine employment. Claimant has not met the "status" test as the coal was a finished product in the stream of commerce. Moreover, Claimant has not met the "function" test, as his work as a trackman was ancillary to the delivery and commercial use of processed coal, rather than an integral function in the extraction or preparation of coal. Finally, Claimant clearly has failed to establish that he worked in or around a coal mine or coal preparation site. Claimant testified that he never worked in or around a coal mine (*Id.* at 34). Moreover, he could not identify a tipple, colliery or a breaker (*Id.* at 33). After considering the above evidence, Claimant has clearly failed to establish that he was a Miner as defined in the Act.

ORDER

The claim of Willie Brown for benefits under the Act is hereby DENIED.

BEN L. O'BRIEN
United States
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board, Suite 757, 1111 20th St., N.W., Washington, D.C. 20036.

U.S. Department of Labor

Benefits Review Board

800 K Street N.W.

Washington, D.C. 20001-8001

BRB No. 89-1662 BLA.

OWCP NO. 260-01-1809.

WILLIE J. BROWN

Claimant-Petitioner

Not-Published
Received
Nov. 1, 1991
W.J.B.

v.

PENN CENTRAL TRANSPORTATION COMPANY

Employer-Respondent

Date Issued: OCT. 28, 1991

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DECISION and ORDER

Appeal of the Decision and Order of Ben L. O'Brien, Administrative Law Judge, United States Department of Labor.

Willie J. Brown, Beckley, West Virginia, pro se.

John T. Pion (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b) (5) (Supp. V 1987).

PER CURIAM:

Claimant appeals, pro se, the Decision and Order (87-BLA-1264) of Administrative Law Judge Ben L. O'Brien, on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). Based on the date of filing, May 16, 1986, the administrative law judge adjudicated the claim pursuant to the permanent regulations found at 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to establish that claimant was a miner as defined in 20 C.F.R. §725.101(a) (26). Accordingly, benefits were denied. The employer, Penn Central Transportation Company, responds seeking affirmance of the decision below.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the decision below is supported by substantial evidence. McFall v. Jewell Ridge Coal Corp., 12 BLR 1-176 (1989); Stark v. Director, OWCP, 9 BLR 1-36 (1986). The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §932(a), O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The administrative law judge found that claimant was employed as a trackman with the Penn Central Transportation Company from 1948 to 1982. See Decision and Order at 3. In order to establish that claimant was a miner within the meaning of the Act and regulations, the Board has held that he must satisfy a three-prong test, viz., it must be established that the "miner" worked with coal that was still in the course of being processed, and not yet a finished product in the stream of commerce (status of the coal test); that the "miner" performed a function integral to the extraction or preparation of coal, and not one merely ancillary to the delivery and commercial use of processed coal (function test); and that the "miner's" work occurred in or around a coal mine or coal preparation facility (situs test). Whisman v. Director, OWCP, 8 BLR 1-96 (1985); see also 30 U.S.C. §902(d); 20 C.F.R. §725.101(a) (26).

Claimant testified that his employment as a trackman brought him into contact with coal that was being transported in freight trains. He stated also that he cleaned up coal that spilled onto the tracks, that he cleaned up train wrecks, and that daily he unloaded coal from cars and put it into a pit at a heating plant. See Hearing Transcript at 21-24, 29, 30, 34-35. Claimant stated further that he did not know the difference between raw and prepared coal. See Hearing Transcript at 30. In determining whether claimant satisfied the "status" test, the administrative law judge considered the deposition testimony of Frederick Day and William Worthington, two Conrail employees. Mr. Day testified that the coal hauled in the New York division, claimant's division, was all directly consumed. See Employer's Exhibit 8 at 7-8. Mr. Worthington testified that all of the coal hauled through the New York division was prepared coal. See Employer's Exhibit 9 at 16. Based on this testimony, the administrative law judge found that claimant failed to meet the "status" test because the coal around which he worked was processed coal. This finding is within the discretion of the administrative law judge, see Shaw v. Director OWCP, 7 BLR 1-652 (1985), is supported by substantial evidence, and is therefore affirmed.

The administrative law judge next determined that claimant failed to meet the "function" test. The administrative law judge stated that claimant's work as a trackman was ancillary to the delivery and commercial use of processed coal, rather than an integral function in the extraction or preparation of coal. See Decision and Order at 4. As the administrative law judge considered the witnesses' testimony and permissibly determined that claimant worked around trains that hauled processed coal, it does not appear that claimant's work was an integral function in the extraction or preparation of coal. See Richardson v. Denver Rio Grande Western Railroad Co., 7 BLR 1-700 (1985). Thus, the administrative law judge's determination that claimant failed to meet the "function" test is affirmed as it is supported by substantial evidence.

The administrative law judge then addressed the "situs" test. The administrative law judge considered claimant's statements that he had never worked in or around a coal

mine and that he could not identify a tipple, colliery, or a breaker, as well as the testimony of Mr. Day and Mr. Worthington that there were no mines in the area where claimant worked. See Hearing Transcript at 33-34, Employer's Exhibits 8 at 12, 9 at 13. Based on his consideration of this testimony, the administrative law judge permissibly found that claimant failed to establish that he worked in or around a coal mine or preparation site. See Decision and Order at 4; see generally Musick v. Norfolk and Western Railway Co., 6 BLR 1-862 (1984). Therefore, the administrative law judge's determination that claimant failed to meet the "situs" test is affirmed as it is supported by substantial evidence. As the administrative law judge's determination that claimant is not a miner as defined in the Act is supported by substantial evidence this finding is affirmed.

CERTITICATE OF SERVICE

BRB No. 89-1662 BLA:
Willie J. Brown v. Penn Central Transportation Company and Director, Office of Workers' Compensation Programs (Case No. 87-BLA-1264)
(OWCP No. 260-01-1809)

I certify that this Decision and Order was sent this day to:

October 28, 1991 — Lisa L. Lahrman, Executive Counsel, Clerk of the Board

Mr. Willie J. Brown — Certified
Route 3, Box 42
Beckley, WV 25801

John T. Pion, Esq. — Certified
Dickie, McCamey and Chilcote
Suite 400
Two PPG Place
Pittsburgh, PA 15222

Melissa Reardon Henry, Esq. — Certified
Office of the Solicitor
U.S. Department of Labor
Suite N-2605, NDOL
Washington, DC 20210

Mr. Steven Breeskin
Deputy Commissioner
U.S. Department of Labor
Suite C-3516, NDOL
Washington, DC 20210

Judge Ben L. O'Brien
U.S. Department of Labor
Suite 605
200 S. Andrews Avenue
Ft. Lauderdale, FL 33301

U.S. Department of Labor
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 89-1662 BLA.
Case No. 87-BLA-1264.
OWCP No. 260-01-1809.

WILLIE J. BROWN

Claimant-Petitioner

v.

PENN CENTRAL TRANSPORTATION COMPANY

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

Received
Jan. 4, 1992
W.J.B.

Date Issued: DEC. 30, 1991

ORDER DENYING RECONSIDERATION

As no member of the panel has affirmatively voted to vacate or modify the decision herein, the motion for reconsideration filed by claimant is DENIED. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(a), (b), 802.407(a), 802.409.

By Order of the Board:
Lisa L. Lahrman, Executive Counsel
Clerk of the Board

Accordingly, the Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

CERTIFICATE OF SERVICE

BRB No. 89-1662 BLA:
Willie J. Brown v. Penn Central Transportation Company and Director, Office of Workers' Compensation Programs (Case No. 87-BLA-1264) (OWCP No. 260-01-1809)

I certify that this Order was sent this day to:

DEC. 30, 1991 — Lisa L. Lahrman, Executive Counsel, Clerk of the Board

Mr. Willie J. Brown — Certified
312 Harper Heights Road
Beckley, WV 25801

John T. Pion, Esq. — Certified
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Mr. Steven Breeskin
Deputy Commissioner
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Washington, DC 20210

Judge Ben L. O'Brien
U. S. Department of Labor
Suite 605
200 S. Andrews Avenue
Ft. Lauderdale, FL 33301

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

P. DOUGLAS SISK
CLERK

TELEPHONE
215-597-2995

June 11, 1993

Mr. Willie J. Brown, Esquire
312 Harper Heights Road
Beckley, WV 25801

Re: Brown v. Penn Central Transportation Co., et al.
No. 92-3011.

Dear Mr. Brown:

Enclosed herewith is conformed copy of order filed today in the above-entitled case.

Very truly yours,
Kathleen Grady
Deputy Clerk
Direct Dial: 597-5846

ko
enc.

cc: (Michael J. Denney, Esq.
(Barry H. Joyner, Esq.
J. Lawson Johnston, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3011

WILLIE J. BROWN,
Petitioner

v.

PENN CENTRAL TRANSPORTATION COMPANY and DIRECTOR, OFFICE OF WOKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review from the
Benefits Review Board
BRB No. 89-1662 BLA

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, Circuit Judges,

The petition fer rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:
Circuit Judge

DATED: JUNE 11, 1993

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

P. Douglas Sisk
Clerk

Telephone
215-597-2995

June 22, 1993

Ms. Lisa L. Lahrman
Benefits Review Board
United States Department of Labor
800 K Street, N.W.
Room 500
Washington, DC 20001

RE: **Docket No. 92-3011**
Brown vs. Director OWCP
BRB No. 89-1662 BLA

Dear Ms. Lahrman:

Enclosed is a certified copy of the judgment order in the above-entitled case(s). The certified judgment order is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

(X) We return herewith the certified record in the case(s).

( ) We release herewith the certified list in lieu of the record.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment order is also enclosed showing costs taxed, if any.

Very truly yours,.
P. Douglas Sisk
Clerk
Direct Dial 597-5846

Enclosure

cc:

Willie J. Brown
(Michael J. Denney, Esq.
(Barry H. Joyner, Esq.
J. Lawson Johnston, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3011

WILLIE J. BROWN,

Petitioner

v.

PENN CENTRAL TRANSPORTATION COMPANY and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review from the
Benefits Review Board BRB No. 89-1662 BLA

Submitted Under Third Circuit Rule 12(6)
April 2, 1993

Before: BECKER, GREENBERG, and NYGAARD,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against Petitioner.

BY THE COURT:
David R. Becker
Circuit Judge

Attest:
P. Douglas Sisk, Clerk

Filed: May 20, 1993

Certified as a true copy and issued in lieu of a formal mandate on June 22, 1993.

Attest:

P. Douglas Sisk, Clerk
U. S. Court of Appeals for the Third Circuit.

CERTIFICATE OF SERVICE

I hereby certify copy of the petition for Writ of Certiorari and appendix thereto have been furnished by registered U. S. Mail to respondents, and the Honorable Robert C. Byrd, U. S. Senator, Washington, D.C. 20510, Solicitor General Office, Dept. of Justice, Washington, D.C. 20530, Attorney General Office, State Capital of West Virginia, Charleston, West Virginia 25305.

Re: Willie J. Brown, Petitioner vs. Penn Central Transportation Co., Director, OWCP, U.S. Dept. of Labor, U.S. Court of Appeals for the Third Circuit.

Respondents.

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Office of the Clerk
Supreme Court of the U.S.
Washington, DC 20543

P. Douglas Sisk, Clerk
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Philadelphia, PA 19106

The Honorable Robert C. Byrd
United States Senator
Washington, DC 20510

Solicitor General Office
Department of Justice
Washington, DC 20530

Attorney General Office
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Charleston, WV 25305

Registered Mail